

## IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	
	)	No. 64073-9-I
Appellant,	)	
	)	DIVISION ONE
v.	)	
	)	UNPUBLISHED OPINION
LEROY EDWARD OLSEN III,	)	
	)	
Respondent.	)	FILED: August 2, 2010
	)	

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Appelwick, J. — Four days before trial was to begin for Olsen’s charge of vehicular assault under the influence of alcohol, the State notified defense counsel that it would use retrograde extrapolation to prove Olsen’s BAC (blood alcohol concentration) level at the time of the accident. Until this point, the State had represented to the court and to defense counsel that it would not employ an expert witness to conduct retrograde extrapolation. Olsen moved to exclude this evidence. The trial court found the disclosure was untimely and excluded the evidence of retrograde extrapolation. The State then moved to dismiss, arguing the exclusion of retrograde extrapolation evidence left it no choice but to move to dismiss the case. The court dismissed the case. The State appealed, arguing the trial court abused its discretion in excluding the retrograde extrapolation evidence. Exclusion of the evidence is an extraordinary remedy. The court had other feasible discovery sanctions available to it. Because the failure was not in bad faith and because the record before us demonstrates no significant prejudice to the defendant from the alternative sanctions, we hold the trial court abused its discretion in excluding the evidence. We reverse and remand for trial.

## FACTS

The State charged Leroy Olsen with one count of vehicular assault under the influence of alcohol pursuant to RCW 46.61.522. Olsen failed to negotiate a turn, collided first with a telephone utility pedestal, and then a large tree. In the process, Olsen ran another driver off the road. Olsen's passenger, Kim Blain, suffered a fractured pelvis as a result of the collision. The affidavit for probable cause states that Lisa Noble, an analyst in the Washington State Toxicology Laboratory, examined the blood and issued a report showing Olsen had a blood ethanol level of 0.23 g/100mL at just more than two hours after the collision. The State conceded it could not prove the test occurred within two hours after the collision.

RCW 46.61.502(1) provides three different methods for proving a person was driving under the influence. One of them is for the State to prove that "the person has, within two hours after driving, an alcohol concentration of 0.08 or higher as shown by analysis of the person's breath or blood made under RCW 46.61.506." RCW 46.61.502(1)(a). The accident Olsen caused occurred at approximately 6:20 in the evening, and the blood draw occurred at 8:30 p.m. The other options available to prove intoxication are proving that a person was driving while "under influence of or affected by intoxicating liquor or any drug" or "under the combined influence of or affected by intoxicating liquor and any drug." RCW 46.61.502(1)(b),(c).

The omnibus application order required the State "to advise whether any expert witness will be called," and if so it was required to supply the name of the

witness, the qualifications, the subject of testimony, and the report. Trial was set to begin on February 3, 2009, with a readiness hearing on January 21, 2009. The State's list of witnesses, filed on December 26, 2008, listed Noble.

The defense moved to compel the State to provide the expert reports covering anticipated testimony and opinions. The State argued in its response to the motion to compel that it had already complied with its discovery obligation. It also stated Noble "may testify regarding her testing of the defendant's blood, including, but not limited to, the results of the test. Ms. Noble produced a report containing the results of her testing, which has previously been disclosed to the defendant."

At the readiness hearing on January 21, Olsen's counsel asked whether Noble would be offering anything beyond the results of the blood test, including opinions about the effect of alcohol on the human body. The prosecutor replied:

Your Honor, we have not asked Ms. Noble to provide any sort of opinion regarding anything beyond what's contained within her report, basically the level of alcohol she found while testing the blood. If we did at a later date ask her to form those opinions, we would, of course, put that in a summary and disclose that to counsel. But at the moment, she has not been asked to do that.

The court then asked the prosecutor whether Noble would include retrograde extrapolation in her opinion about the BAC at the time of the accident. The prosecutor replied, "Your Honor, at this point, no." Noble's report does not reference retrograde extrapolation; rather, it simply contains one BAC level, 0.23 g/100mL.

The parties also agreed to a continuance, with a new readiness hearing

on July 21, 2009. Olsen waived his speedy trial right through August 31, 2009. Trial was set to begin on August 4, 2009. At the July 21 readiness hearing,<sup>1</sup> both parties had represented to the court that they were ready to proceed. There was no discussion of expert witnesses. On Friday, July 31, the prosecutor notified Olsen's counsel that Noble would testify using retrograde extrapolation.

On August 4, 2009, Olsen moved to exclude Noble's expert testimony using retrograde extrapolation. The trial court ruled that Noble's testimony should be excluded, as Olsen was entitled to rely on the representation made by the first prosecutor that the State would not pursue retrograde extrapolation. The court noted that, although the State had ultimately notified Olsen's counsel of its plan to use retrograde extrapolation, the disclosure was untimely. The court specifically stated it was not excluding evidence of the effect of alcohol on the human body, allowing the State to proceed under RCW 46.61.502(b), which does not require showing a specific alcohol concentration within a specific amount of time. The State represented it could not prove the blood test was taken within two hours of the accident. It then immediately moved the court to dismiss the case, based on the court's exclusion of Noble's testimony. It specifically requested that the court "make a finding based on the Court's ruling for defense's motion in limine Number 4 [Noble's testimony about retrograde extrapolation] that the state cannot proce[de]." Olsen moved to dismiss under CrR 4.7 for discovery violations, and in the alternative, for prosecutorial

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<sup>1</sup> By this point, the prosecutor originally assigned to Olsen's case had left the prosecutor's office.

mismanagement under CrR 8.3(b).

The trial court dismissed the case, finding that the prosecution was unable to move forward. The State moved for reconsideration, providing for the first time a summary of Noble's conclusions on retrograde extrapolation, which was dated August 5, 2009. The court denied reconsideration. The State appealed.

### DISCUSSION

The State contends the trial court abused its discretion in excluding Noble's testimony, as there were other less extreme sanctions available. Discovery decisions based on CrR 4.7 are within the sound discretion of the trial court. State v. Hutchinson, 135 Wn.2d 863, 882, 959 P.2d 1061 (1998). Discretion is abused when the trial court's decision is manifestly unreasonable, or is exercised on untenable grounds or for untenable reasons. State v. Ramos, 83 Wn. App. 622, 636, 922 P.2d 193 (1996).

Exclusion or suppression of evidence is an extraordinary remedy and should be applied narrowly. Hutchinson, 135 Wn.2d at 882. CrR 4.7(a)(1) provides the specific duties of the prosecutor to disclose both the identity of an expert witness and the basic substance of the testimony:

[T]he prosecuting attorney shall disclose to the defendant the following material and information within the prosecuting attorney's possession or control no later than the omnibus hearing:

(i) the names and addresses of persons whom the prosecuting attorney intends to call as witnesses at the hearing or trial, together with any written or recorded statements and the substance of any oral statements of such witnesses;

...

(iv) any reports or statements of experts made in connection with the particular case, including results of physical or mental examinations and scientific tests, experiments, or comparisons;

The rule also provides the prosecutor shall disclose to the defendant “any expert witnesses whom the prosecuting attorney will call at the hearing or trial, the subject of their testimony, and any reports they have submitted to the prosecuting attorney.” CrR 4.7(a)(2)(ii). Finally, CrR 4.7(h)(7)(i) provides the court authority to impose a range of sanctions:

[I]f at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with an applicable discovery rule or an order issued pursuant thereto, the court may order such party to permit the discovery of material and information not previously disclosed, grant a continuance, dismiss the action or enter such other order as it deems just under the circumstances.

The State specifically argues that suppression of evidence under CrR 4.7(h)(7)(i) is not one of the sanctions available for failure to comply with discovery rules. Under Hutchinson, however, a trial court may exclude testimony as a sanction for discovery violation. 135 Wn.2d at 881 (“While CrR 4.7(h)(7)(i) does not enumerate exclusion as a remedy, it does allow a trial court to ‘enter such other order as it deems just under the circumstances.’ This language allows the trial court to impose sanctions not specifically listed in the rule.” (quoting CrR 4.7(h)(7)(i))). However, the usual sanction for failure to produce evidence or identify witnesses in a timely manner is a continuance “to give the nonviolating party time to interview a new witness or prepare to address new evidence.” Id. Where the State’s violation is serious, mistrial or dismissal may be appropriate.

Id.

The factors to be considered in deciding whether to exclude evidence as a sanction are: (1) the effectiveness of less severe sanctions; (2) the impact of witness preclusion on the evidence at trial and the outcome of the case; (3) the extent to which the other party will be surprised or prejudiced by the witness's testimony; and (4) whether the violation was willful or in bad faith. Id. at 882–83.

Consideration of these factors leads us to conclude the trial court abused its discretion in suppressing the evidence of retrograde extrapolation. The court had available to it a less severe sanction—a continuance to allow Olsen to seek a rebuttal expert witness and conduct other necessary discovery.<sup>2</sup> CrR 4.7(h)(7). The evidence was central to the State's ability to prove Olsen was intoxicated at the time of the accident, under RCW 46.61.502(1)(a). Although

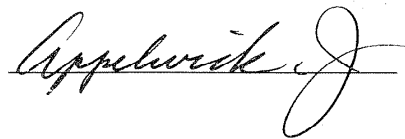
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<sup>2</sup> Although defense counsel asserted there were speedy trial issues that might arise in the event of a continuance, he did not develop this argument, nor did the court rule on any speedy trial issues. CrR 3.3(b)(5) provides that “[i]f any period of time is excluded pursuant to section (e), the allowable time for trial shall not expire earlier than 30 days after the end of that excluded period.” A continuance is an excluded period. CrR 3.3(e)(5). CrR 3.3(b)(5) ensures “that there will always be at least 30 days, following the conclusion of any excluded period of time, within which a trial may be started. . . . The additional 30 days come into play only if there are fewer than 30 days remaining in the defendant’s 60/90-day time period.” Time-for-Trial Task Force Final Report, *available at* <http://www.courts.wa.gov> (follow “Resources, Publications, and Reports” hyperlink; then follow “Boards, Commissions, Programs & Orgs” hyperlinks; then follow “Time-for-Trial Final Report” hyperlink under the “Committees” heading; then follow the “final report” hyperlink; then follow “Discussion of consensus Recommendations” hyperlink). And, in fact, the trial court demonstrated it considered a continuance as a valid option, as the court asked defense counsel about this possibility. While such a continuance may have adjusted the time for trial date under CrR 3.3(b)(5), the parties did not brief any constitutional implications that may have arisen. Our analysis here is based only on the applicable court rules.

the State could have proceeded under RCW 46.61.502(1)(b) without retrograde extrapolation, it did not believe it had sufficient evidence to do so. The State concedes the supplemental disclosure that Noble would testify using retrograde extrapolation was untimely. While the State's untimely disclosure was unprofessional and clearly improper, Olsen admits the violation was not willful or in bad faith. Further, the record does not reflect that Olsen would have been actually prejudiced by another short continuance. The court could have ordered a short continuance. Under CrR 3.3(b)(5), the time for trial deadline would have been extended. However, even without that extension, nothing required the court to delay the actual start of trial beyond August 31, the date on which Olsen's speedy trial waiver expired.

Exclusion of evidence is an exceptional remedy that a trial court should rarely use. There was a viable alternative to exclusion of the evidence. There was neither bad faith on the part of the State, nor prejudice to the defendant from the alternative. We hold the trial court abused its discretion in excluding the evidence of retrograde extrapolation.

We reverse and remand for trial.

A handwritten signature in cursive script, appearing to read "Appelwick J.", written over a horizontal line.

WE CONCUR:



Jan, J.

Becker, J.